UNIVERSITY OF TORONTO
FACULTY OF LAW

Materials for

The Legal Process, Winter 2022

Volume 2

Faculty of Law, University of Toronto

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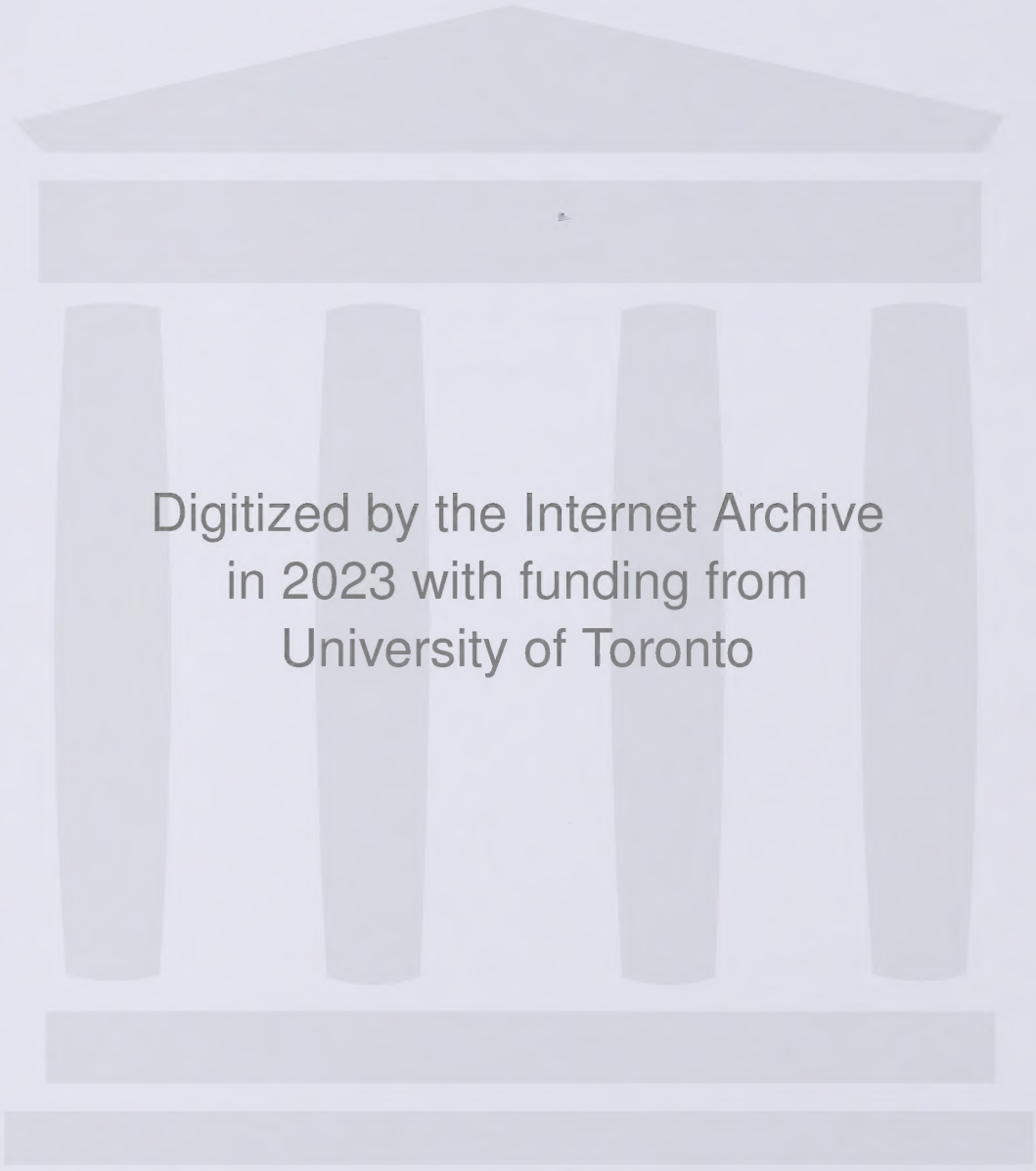

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C. Notes on Pre-Trial Proceedings in Criminal Matters

1. Interim relief?

There is no such thing as interim relief in criminal proceedings.

However, denial of bail can have an effect on the criminal process that is similar to the effect of granting of an interlocutory injunction on the civil process. When an accused is refused bail, the fact of his continued detention can encourage settlement (*i.e.*, a guilty plea). Moreover, the refusal of bail can effectively result in an accused serving some or all of his sentence prior to being found guilty because time spent in pre-trial custody is normally deducted from the sentence (usually at the rate of 1.5 to 1, *i.e.*, 1.5 days are deducted from the sentence for every day served in pre-trial custody). But if the accused is acquitted, there is no remedy for a denial of bail.

The right "not to be denied reasonable bail without just cause" is guaranteed by s. 11(*e*) of the *Charter*. The statutory scheme for bail (judicial interim release) is laid out in ss. 515-523 of the *Code*. The criteria for denying bail are listed in s. 515(10). The leading resource on this topic is Gary T. Trotter, *The Law of Bail in Canada*, 3d ed. (Toronto: Carswell, 2010, loose-leaf).

2. Disclosure

Apart from s. 657.3 of the *Code*, which is concerned with expert reports, there is no statutory framework for discovery in criminal proceedings. In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the Supreme Court of Canada held that the right to a fair trial guaranteed by ss. 7 and 11(*e*) of the *Charter* requires the Crown to disclose to the defence all information in its possession about the case against the accused, unless the information is clearly irrelevant or privileged. The disclosure obligation extends beyond material actually in the Crown's possession to include material in the possession of the police and potentially other government entities (on this issue, see *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66). The remedy for a failure of the Crown's disclosure obligation can range from a brief adjournment to a stay of proceedings. For an attempt to summarize the law in this area, see Hamish Stewart, *Fundamental Justice*, 2d ed. (Toronto: Irwin Law, 2019) at pp. 303-313.

Generally, there is no obligation on the defence to disclose any information to the prosecution. There are two exceptions to this general statement: (1) Section 657.3 of the *Code*, which applies to both Crown and defence. (2) At common law, an accused who intends to rely on an alibi should disclose the alibi in a timely way so that it can be investigated; failure to disclose the alibi can result in an adverse inference being drawn against the accused (see, for example, *R. v. Cleghorn*, [1995] 3 S.C.R. 175).

Does the accused have a constitutional right to non-disclosure, as an aspect of the right to make full answer and defence? See *R. v. J.J.*, 2020 BCSC 29 and 2020 BCSC 349, an appeal from which was argued in the Supreme Court of Canada on 6 October 2021.